

REPLY BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

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20-5580

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JACK L. STOVER,

Appellant,

v.

DENIS MCDONOUGH,  
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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## APPELLANT'S REPLY ARGUMENTS

### **I. The undisputed fact that the Board applied the M21-1 Thailand provision means that it is binding authority in this case and Mr. Stover has a legally enforceable right to compliance with it.**

The Secretary concedes that the Board “cited language from the [M21-1] Thailand provision and then applied it to the Appellant’s case.” Sec.Br. at 8. But he argues that even if the Board *incorrectly* applied the provision, “the Court should [] affirm the Board’s decision because [the] provision is non-binding authority that creates no judicially enforceable rights.” Sec. Br. at 24. This legally untenable position is inconsistent with this Court’s holding in *Andrews v. McDonough*, -- Vet.App. --, 2021 WL 2549071 (June 22, 2021).

In *Andrews*, the Court held, “By specifically incorporating the relevant M21-1 provision into [its] remand order, the Board rendered this authority binding on . . . how the Board would readjudicate it if the matter returned there.” 2021 WL 2549071, at \*6. “The Board’s citation to a manual provision amounts to a tacit recognition that the provision constitutes authority in the case.” *Id.* Here, the Board did more than merely cite the M21-1 provision in a remand order—by the Secretary’s own admission, it *applied* it in its decision. *See* Sec. Br. at 8. Regardless of whether the Thailand provision is *generally* binding on the Board, then, it is binding in this particular case. *See Andrews*, 2021 WL 2549071, at \*6. The Court should therefore reject the Secretary’s argument that the Veteran has no enforceable right to compliance with the provision. *See* Sec. Br. at 24.

**II. The Court should reject the Secretary’s *post hoc* attempt to limit the M21-1 Thailand provision’s definition of service “near the air base perimeter” to only veterans who performed security or similar duties.**

Mr. Stover submitted photographs and maps that show the Takhli Royal Thai Air Force Base (RTAFB) perimeter was very close to the perimeter fence, R-133; R-138-40; R-269; R-312-19, and buddy statements that further corroborated his reports of being very close to the perimeter, R-321; R-325. His service at Takhli RTAFB required him to spend at least ten hours per day, six days per week, on the base flight line, within 100 yards of the perimeter fence. R-158; R-289; R-325; R-625. At least once a month, he performed emergency repairs on aircraft at the end of the runway, “maybe 20 or 30 feet” away from the perimeter fence. R-288-89. As Mr. Stover argued in his initial brief, this evidence established service near the perimeter, and the Board provided legally insufficient bases for rejecting this evidence. *See* App. Br. at 14-22; *infra* Arg. III; *but see* Sec. Br. at 14-19. And so, the Veteran was entitled to a concession of herbicide exposure under VA’s M21-1 Thailand provision. *See* M21-1 VIII.i.1.A.4.b; *see also* App. Br. at 22-23; *supra* Arg. I.

But the Secretary contends the Board properly found the Veteran did not serve near the perimeter because he did not “regularly and repeatedly come within feet of the physical base perimeter for long periods each day.” Sec. Br. at 11; *see also* Sec. Br. at 4, 10, 12, 13, 21-22, 24. This supposedly required “long hours walking along the perimeter, as security personnel might have done,” which are inherently different from duties on the flight line. *See* Sec. Br. at 22; *see also* Sec. Br. at 10-11.

The Secretary’s arguments in this regard largely boil down to *post hoc* rationalization, as the Board did not deny the claim based on a lack of regular and repeated service walking



along the perimeter for hours at a time. *See* R-7-16. It denied it because it believed—wrongly—that service on the flight line, no matter how “near” the perimeter, did not qualify under the M21-1 provisions. R-11-13. The Court should reject the Secretary’s call to affirm the Board’s decision on a basis not invoked by the Board. *See Tadlock v. McDonough*, 5 F.4 1327, No. 2020-1762, 2021 WL 2964328, at \*7-9 (Fed. Cir. July 15, 2021) (holding that the Veteran’s Court may not adjudicate an issue the Board did not address).

Setting the impermissible *post hoc* nature of the Secretary’s arguments aside, as well as the evidence, *infra* Arg. III, showing that the Veteran did in fact routinely serve near the perimeter, the Court should reject the notion that the M21-1’s Thailand provision applies only to veterans who worked “long hours walking along the perimeter, as security personnel might have done.” *See* Sec. Br. at 21-23. It only requires credible evidence of presence near the perimeter, and this requirement is broad enough to encompass duties along the flight line next to the perimeter. M21-1 VIII.i.1.A.4.b.

The Secretary’s unduly narrow interpretation is inconsistent with the ordinary meaning of the provision. *See Withers v. Wilkie*, 30 Vet.App. 139, 146 (2018). He asserts that the M21-1 extends the special consideration of herbicide exposure to the occupations enumerated in the Thailand provision because they required “regular and repeated presence in the same location herbicides were applied.” Sec. Br. at 21-22; *see also* Sec. Br. at 10-11. He notes that “none of the occupational specialties listed as examples are those that would involve working on the flight line.” Sec. Br. at 22. In his view, if service on the flight line was intended to be considered “‘near’ the perimeter, one would expected [the drafters of the M21-1] to have identified one of those occupations among the examples.” *Id.* He therefore

maintains that service on the flight line cannot qualify for Thailand exposure consideration. *Id.*

But the M21-1 states that VA will “concede herbicide exposure on a direct/facts-found basis” to veterans who served on RTAFBs during the Vietnam era if they served “as an Air Force security policeman, security patrol dog handler, member of the security police squadron, *or otherwise near the air base perimeter* as shown by evidence of daily work duties, performance evaluation reports, or other credible evidence.” M21-1 VIII.i.1.A.4.b (emphasis added); *see* App. Br. at 9-10. Put another way, herbicide exposure should be conceded for security personnel *or* veterans who were otherwise near the air base perimeter—i.e., for reasons that were not security-related—as shown by evidence of their work duties, performance reports, or other credible evidence. *See* M21-1 VIII.i.1.A.4.b.

In arguing that the concession of exposure requires having an occupation similar to those highlighted in the M21-1, Sec. Br. at 22, the Secretary appears to argue that the Court should apply the canon of *ejusden generis*—“when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration.” *Norfolk & Western Ry. Co. v. American Train Dispatchers Ass’n*, 499 U.S. 117, 129 (1991). But that canon does not apply when “the whole context [of the provision in question] dictates a different conclusion.” *Id.*

Here, the phrase “otherwise near the air base perimeter” in the Thailand provision imposes no limits on the *circumstances* in which a veteran may be near the perimeter to benefit from the provision. *See* M21-1 VIII.i.1.A.4.b. On its face, the relevant subject of the phrase “otherwise near” is veterans who were close to the air base perimeter. *See* App. Br. at 10;

*Near*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/near> (last accessed Aug. 20, 2021) (defining near as “at, within, or to a short distance or time”). It does not solely contemplate veterans with occupations like those noted in the M21-1. *But* Sec. Br. at 22. By extending the provision to veterans who were “otherwise near” the perimeter, the drafters of the M21-1 included a term of distance but were silent about an amount of time at the perimeter or a requirement to walk along it. *See* M21-1 VIII.i.1.A.4.b. Accordingly, *ejusdem generis* does not apply. *See Norfolk & Western Ry. Co.*, 499 U.S. at 128-29. And so, the Secretary is incorrect that the M21-1 Thailand provision is only applicable to veterans with occupations like those spelled out in the M21-1. *But see* Sec. Br. at 10-11, 21-22.

Rather, the Court should apply the ordinary-meaning canon and “assume the contextually appropriate ordinary meaning[]” of the phrase “otherwise near.” *Withers*, 30 Vet.App. at 146 (quoting ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 70 (2012)). Pursuant to this canon, otherwise near cannot mean only near the perimeter by having an enumerated occupation; this interpretation would render “or other credible evidence” superfluous. *See* App. Br. at 13-14. The Secretary’s reading reduces these words to mere surplusage. *See* Sec. Br. at 10-11, 21-22. And such a reading should be avoided. *Duncan v. Walker*, 553 U.S. 167, 174 (2001); *see also Smith v. Brown*, 35 F.3d 1516, 1523 (Fed. Cir. 1994) (holding that “canons of construction of course apply equally to any legal text and not merely to statutes.”).

Nor is the Secretary correct that applying this reading would render the enumerated occupations meaningless. Sec. Br. at 9. Veterans who served as security policeman, security patrol dog handler, or members of security police squadrons do not need additional evidence

to demonstrate presence on the perimeter. M21-1 VIII.i.1.A.4.b. Other veterans are not afforded the same relaxed concession as these positions. *Id.* Thus, it is *the Secretary's* reading of the provision that would render a portion meaningless.

The Secretary's argument is also inconsistent with the intent and purpose of the M21-1's Thailand provision. He argues that "being on the flight line or housed in certain living quarters" cannot satisfy the M21-1 provision—no matter how close to the perimeter the flight line or living quarters are—"or else virtually everybody who served on these air bases would have served 'near' the perimeter" as to warrant a concession of herbicide exposure. Sec. Br. at 9; *see also* R-11. Mr. Stover does not suggest the provision should apply to *all* veterans who served on a RTAFB. *See* App. Br. at 9-11, 22-23. He only argues that it should apply to him because he satisfied its requirement of presenting credible evidence that he was near the perimeter. App. Br. at 22-23; *see Hudick v. Wilkie*, 755 Fed.Appx. 998, 1007 (Fed. Cir. 2018)<sup>1</sup>; *see also Jandreau v. Nicholson*, 492 F.3d 1372, 1376 (Fed. Cir. 2007) (holding that "competent lay evidence can be sufficient in and of itself" to support a finding of service connection). Veterans who served at Takhli RTAFB but not on the flight line near the perimeter and were not housed near the perimeter are not entitled to the benefit of the provision.

The Secretary ignores that the very purpose of the Thailand provision was to *relax* the burden of veterans who were near the perimeter of the RTAFBs in showing they were exposed to herbicides that VA concedes were used at those locations. In the May 2010

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<sup>1</sup> The Veteran cites this non-precedential decision for the persuasive vale of its logic and reasoning because no clear precedent exists as to whether credible evidence of perimeter contact alone is sufficient under the M21-1. *See* U.S. Vet. App. R. 30(a).

Compensation and Pension Service Bulletin, upon which the M21-1 Thailand provision is based, VA announced it had “determined that a special consideration of herbicide exposure on a facts found or direct basis should be extended to those Veterans whose duties place them on or near the perimeters of Thailand military bases.” R-30 (*Herbicide Related Claims From Veterans With Thailand Service, VA Compensation & Pension Service Bulletin*, at 3 (May 2010)).<sup>2</sup> The M21-1 Thailand provision acknowledges that dangerous herbicides were used on the perimeters of RTAFBs, including Takhli. M21-1 VIII.i.1.A.4.b. It also concedes that veterans who were on or near the perimeter were at least as likely as not exposed to those dangerous herbicides. *Id.* This provision was meant to make it *easier* for Thailand Air Force veterans who credibly served near the perimeter to establish service connection given the evidence in the public record that there was significant use of herbicides along the fenced perimeters of Thailand military bases. *See id.*; *see also* Sec. Br. at 6-7; R-. And this provision was necessary because it would be nearly impossible for most veterans to produce evidence of direct contact with herbicides. *See* M21-1 VIII.i.1.A.4.b; *see also Moore v. Shinseki*, 555 F.3d 1369, 1374-75 (Fed. Cir. 2009) (acknowledging that “many veterans lack the knowledge and resources necessary to locate relevant records”).

The easing of this burden on Thailand veterans tracks with how veterans’ law has traditionally operated. *See Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 440 (2011) (noting the “solicitude of Congress for veterans is of long standing” and “plainly reflected in ... subsequent laws that place a thumb on the scale in the veteran’s favor.”), citing *United States v. Oregon*, 366 U.S. 643, 647, 81 S.Ct. 1278, 6 L.Ed.2d 575 (1961)). The Secretary fails

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<sup>2</sup> For the Court’s convenience, the Bulletin is attached as an appendix to this reply.

to demonstrate why that was not intended here. *See* Sec. Br. at 5-8. Consequently, the Court should reject the Secretary's argument that applying the provision to Mr. Stover would be inconsistent with the intent behind the Thailand provision. *But see* Sec. Br. at 9-11, 22.

And Mr. Stover is precisely the type of veteran the Thailand provision was intended to benefit. *See* App. Br. at 9-24. Ten to twelve hours per day, six days per week, he was within 100 yards of the perimeter while working on the flight line at Takhli RTAFB. R-158; R-289; R-325; R-625. At least once a month, he had to do work at the end of the runway, "maybe 20 or 30 feet" from the perimeter fence. R-288. And his sleeping quarters, a hooch with no windows, were also near the perimeter. R-158; R-314. Neither the Board nor the Secretary provided any reason why walking along the perimeter as a security policeman was so far removed from sleeping or working next to it such that the M21-1 was clearly intended only to concede herbicide exposure in the former case but not the latter ones. *See* R-8-16; Sec. Br. at 8-24. The M21-1 provision is plainly concerned with a veteran's proximity to the perimeter, not the specific actions he took near it. *See* M21-1 VIII.i.1.A.4.b; *see also* R-30-31.

Finally, the Secretary's argument that the M21-1 only applies to veterans who served in walking positions is inconsistent with how the Board applies the M21-1. *See* Sec. Br. at 10-11, 22. The Board has awarded service connection pursuant to the provision to an F-105 crew chief, a jet engineer mechanic, a telecommunications system operator, an inventory specialist, a heavy equipment operator, and a data processing specialist. *See* (Title Redacted by Agency), Bd. Vet. App. 1028449 (July 29, 2010); (Title Redacted by Agency), Bd. Vet. App. 1120212 (May 24, 2011); Bd. Vet. App. 1218023 (May 21, 2012); (Title Redacted by Agency), Bd. Vet. App. 1507797 (Feb. 23, 2015); (Title Redacted by Agency), Bd. Vet. App.

1521529 (May 20, 2015); (Title Redacted by Agency), Bd. Vet. App. 1711379 (Apr. 10, 2017). These specialties were not “walking positions.” *But see* Secretary’s Br. at 10-11, 22.

The Board has also granted service connection based on the proximity of a veteran’s quarters to the base perimeter. In one case, the Board found the veteran had “service near the Udorn air base perimeter” based on statements and photographs indicating that his barracks was adjacent to a screened off wall close to the perimeter. (Title Redacted by Agency), Bd. Vet. App. 1603380 (Feb. 20, 2015). Likewise, it granted service connection to a maintenance scheduling specialist who lived in an open-air barracks about thirty yards from the perimeter, as well as a veteran who estimated his sleeping quarters to have been 400 to 500 yards from the perimeter. (Title Redacted by Agency), Bd. Vet. App. 19143942 (June 6, 2019); (Title Redacted by Agency), Bd. Vet. App. 18144249 (Oct. 25, 2018). Even the Secretary has conceded error in at least one case where the Board failed to consider whether the Veteran’s barracks were near the perimeter for purposes of the Thailand provision. *See Johnson v. Wilkie*, 2019 WL 6332161, at 4 (Vet.App. Nov. 27, 2019).<sup>3</sup>

These non-binding decisions show how the Board interprets and applies VA rules. *See Hudgens v. McDonald*, 823 F.3d 630, 637-38 (Fed. Cir. 2016) (considering prior Board decisions in assessing the reasonableness of VA’s regulatory interpretation); 38 C.F.R. § 20.1303 (2021). The Court can consider them to determine whether the Board used the same standard for similarly situated veterans and failed “to support this disparate treatment

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<sup>3</sup> The Veteran cites this non-precedential decision for the persuasive vale of its logic and reasoning because no clear precedent exists as to whether the M21-1’s Thailand provision applies to veterans whose living quarters were near the perimeter. *See* U.S. Vet. App. R. 30(a).

with a reasoned explanation or substantial evidence.” *Euzebio v. McDonough*, 989 F.3d 1305, 1322 (Fed. Cir. 2021) (internal quotations and alterations omitted). And this Court is not precluded from “taking judicial notice of extra-record evidence that is ‘generally known’ or ‘from sources whose accuracy cannot reasonably be questioned,’ or in accordance with and in furtherance of its review of Board and VA decisions.” *Id.* at 1323 (*quoting Kyhn v. Shinseki*, 716 F.3d 572, 576 (Fed. Cir. 2013)). Accordingly, the Court should consider the above-cited Board decisions in determining whether the Secretary’s argument is consistent with VA’s practice. *Cf. Hudgens*, 823 F.3d at 637.

And in light of these decision, the Court should reject the Secretary’s call for affirmance because Mr. Stover did not serve in a position “requiring long hours walking along the perimeter.” Sec. Br. at 22. VA’s practice has been to concede herbicide exposure and grant service connection to veterans based on their proximity to the perimeter, including working near the flight line and residing in barracks next to the base perimeter just as Mr. Stover did, regardless of their occupational specialty. R-133; R-138-40; R-158; R-288-89; R-312-19. The Board’s decision not to apply the Thailand provision in his case, therefore, was arbitrary, and the Court should not affirm it. *But see* Sec. Br. at 11, 21-22.



**III. The Secretary is incorrect that the Board offered any legally tenable reason for determining the Veteran's credible evidence did not establish service near the perimeter.**

The Secretary argues that Mr. Stover's personnel records showing service on the flight line within 100 yards of the perimeter, and the other evidence about the location of his hooch, radio station, and route around the base, were properly discounted because the Board found such evidence "did not qualify as service 'near' the perimeter." Sec. Br. at 15, 18-19 (citing R-11-12). But he relies on the discredited premise that exposure was only warranted for a limited range of duties. Sec. Br. at 18; *see supra* Arg. II. So, neither the Board, nor now the Secretary, could disregard the evidence on the false premise that only a "limited range of duties" could benefit from the M21-1 Thailand provision. *But see* Sec. Br. at 18.

Next, relying on *Bardwell v. Shinseki*, the Secretary argues that the Board was correct to require objective corroborative evidence of service near the perimeter. Sec. Br. at 17 (24 Vet.App. 36, 40 (2010)). But in *Bardwell*, the Court noted that combat veterans' recollections of their service were singled out by Congress in 38 U.S.C. § 1154(b) to be accepted as sufficient proof of in-service incurrence or aggravation of disease or injury, regardless of any corroborating documentation. 24 Vet.App. at 39-40. Likewise, the drafters of the M21-1 Thailand provision intended it to impose a lower burden than usual on veterans who wished to demonstrate herbicide exposure, requiring just credible evidence—not corroborated evidence—of service near the perimeter. M21-1 VIII.i.1.A.4.b; *see supra* Arg. II.b; *Hudick*, 755 Fed.Appx. at 1005 ("Even when an agency's rules are more generous than they are required to be by statute, these rules must still be followed.").

Relatedly, the Secretary is incorrect that the Court’s holding in *Souzzi v. Brown* that “corroboration of every detail” is not required is inapplicable to the Veteran’s case. 10 Vet.App. 307, 310-11 (1997); App. Br. at 13-14; *but see* Sec. Br. at 12-13. First, the Secretary is incorrect that the Board did not require that service records corroborate the Veteran’s presence near the perimeter. Sec. Br. at 12. The Board denied the claim based in part on its explicit finding that “[t]he evidence in the Veteran’s military personnel file does not show that his work duties placed him at or near the perimeter of Takhli RTAFB . . . .” R-12. Next, the Secretary argues that, unlike in *Souzzi*, the evidence here does not “lead to an inference” supporting the crucial fact—that he was on or near the perimeter. Sec. Br. at 13. In fact, he argues the opposite—“Appellant’s duties instead lead to an inference that he spent most of his time on the flight line away from the perimeter.” Sec. Br. at 13. But this is not what the Board found. *See* R-12. Rather, the Board required that the service records provide explicit corroboration of the evidence showing that he was in fact near the perimeter while on the flight line—his lay statements, his personnel records showing that his duties were on the flight line, and the photographs and maps showing the close proximity of the flight line to the perimeter. *See id.*; *see also* R-133-40; R-288-89; R-312-20; R-898-95. This was error under *Souzzi*, and the Court should reject the Secretary’s argument to the contrary.

Finally, the Secretary defends the Board’s reliance on the passage of time between Mr. Stover’s service and his statements about service on the perimeter to downplay these statements’ probative value. Sec. Br. at 18; R-14; *but see* App. Br. at 18. But this is the *exact same* reasoning the Board relied on in April 2019 to discredit his statements. *Compare* R-14 *with* R-253. And the parties agreed in the January 2020 joint motion for remand that this

reasoning was inadequate. R-228-29. The Secretary suggests Mr. Stover “cannot now complain that the Board failed to comply with the JMR.” Sec. Br. at 16-17 (citing *Vogan v. Shinseki*, 24 Vet.App. 159, 167 (2010)). But *every* remand order imposes a duty to ensure substantial compliance with its terms. *See Stegall v. West*, 11 Vet.App. 268, 271 (1998).

The JMR here directed the Board to account for the fact that all personal accounts of service near the Thailand perimeter would have taken place decades ago. R-228-29. The language of the motion directed the Board to support “any subsequent decision” with “adequate reasons or bases on all material issues of fact and law presented on the record,” again, as in every case. R-232 (citing 38 U.S.C. § 7104(d)(1)). Read together, this means that the Board had to explain why the length of time between Mr. Stover’s service and his statements affected their probative value. *Id.* Just saying this length of time did was not such an explanation. *See* R-12. Because of this, the Board failed to ensure compliance with the joint motion for remand. *Id.*; App. Br. at 17-18; *Stegall*, 11 Vet.App. at 271; *but see* Sec. Br. at 17. And so the lack of any factual basis in the record for finding his statements in the record inconsistent was, contrary to the Secretary’s position, erroneous. App. Br. at 18; *but see* R-14; Sec. Br. at 19.

Further, “[m]ere suspicion or doubt as to the truth of any statements submitted, as distinguished from impeachment or contradiction by evidence or known facts, is not a justifiable basis for denying application of the reasonable doubt doctrine . . . .” 38 C.F.R. § 3.102 (2021). The mere passage of time does not constitute “impeachment or contradiction” of the Veteran’s statements. *See id.* The Secretary’s defense of the Board’s reliance on the passage of time to reject those statements violates his own regulation and

Congress's mandate that he "give the benefit of the doubt to the claimant." 38 U.S.C. § 5107(b).

#### **IV. Reversal is the appropriate remedy.**

"[R]eversal is proper 'where the Board has performed the necessary fact-finding and explicitly weighed the evidence' and the Court is 'left with the definite and firm conviction that a mistake has been committed.'" *Hatfield v. McDonough*, 33 Vet.App. 327, 339 (2021) (quoting *Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013)); *see also* App. Br. at 22-23. As the Board, by the Secretary's admission, applied the M21-1 Thailand provision in Mr. Stover's case, the Court should look to that provision as the applicable law in determining whether a mistake has been committed. *See* R-7; Sec. Br. at 8; *Andrews*, 2021 WL 2549071, at \*6-7; *see also supra* Arg. I. Specifically, it need only determine that, based on the Board's decision, there was credible evidence of service near the perimeter in order to reverse the Board's denial of service connection for diabetes mellitus. R-7; M21-1 VIII.i.1.A.4.b; *see Andrews*, 2021 WL 2549071, at \*6-7 (citing *Hudick*, 755 Fed.Appx at 1008-09).

And here, the Board accepted that Mr. Stover "worked on the flight lines" at Takhli RTAFB during the Vietnam era. R-12; *see Romero v. Tran*, 33 Vet.App. 252, 262 (2021). The uncontroverted credible evidence shows that the Veteran's work on the flight line placed him within 100 yards of the perimeter fence five or six days a week, and within 20 or 30 feet when he had to work at the end of the runway once or twice a month. R-158; R-288-89; *see* App. Br. at 2, 9, 14-22; *supra* Arg. III; *see also* R-133; R-138-40. It also shows that his barracks were right next to the perimeter fence. R-314; *see* App. Br. at 2, 9; *supra* Arg. III. The Secretary does not dispute these facts. *See* Sec. Br. at 8-24. Rather, both he and the

Board incorrectly assert that working on the flight line near the perimeter does not count under the M21-1 provision. This is wrong and, accordingly, the evidence was sufficient to compel the Board to concede herbicide exposure. M21-1 VIII.i.1.A.4.b; *supra* Arg. I; *see Hudick*, 755 Fed.Appx. at 1008; *Andrews*, 2021 WL 2549071, at \*6-7. Because the evidence shows that the Veteran was exposed to herbicides, he is entitled to service connection for his presumptive condition. App. Br. at 23; *see* 38 C.F.R. § 3.309(e) (2021). Accordingly, the Court should reverse the Board's determination that the Veteran was not entitled to service connection and order VA to award it on remand. *Andrews*, 2021 WL 2549071, at \*8. At the very least, vacatur and remand are required for the Board to apply the M21-1 Thailand provision correctly. *See id.* at \*6.

## CONCLUSION

The M21-1 Thailand provision creates a legally enforceable special consideration of herbicide exposure for Air Force veterans who demonstrate service near the perimeter of Royal Thai Air Force Bases. Contrary to the Secretary's *post hoc* interpretation of the provision, this presumption is not limited to veterans with security specialties who regularly and repeatedly walked along the perimeter, and instead is available to any veteran who provides credible evidence of service near the perimeter. Here, Mr. Stover provided such credible evidence, and the Secretary is incorrect that the Board properly discounted this evidence. Therefore, the Court should hold that he was entitled to a concession of herbicide exposure, and order VA to award him service connection for diabetes mellitus.

Respectfully submitted,

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/s/ Amy F. Odom  
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# APPENDIX



# Compensation & Pension Service Bulletin

May 2010

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## **Front Office (21)**

### **Service Center Managers Conference**

The Service Center Managers Conference will take place June 27, 2010 to July 2, 2010 in Orlando, Florida. The conference will focus on quality, training, new processes and updates, and campaign plan initiatives from the recent Director's Workshop. An invitation letter and travel packet will be provided in the near future. This message is being sent for planning purposes, while final coordination is conducted with facilities in Orlando. Should you have any questions or require additional information, please contact Jim Adams (202) 461-9659, the Compensation and Pension (C&P) point of contact. We look forward to meeting with you at the conference.

## **Policy (211)**

### **Routine Future Exams in Scheduling Temporary Total Evaluations**

There has been ongoing confusion in the field regarding the need to schedule routine future examinations when a schedular temporary total evaluation is assigned following a medical event

or procedure. It is clear by the content of the rating schedule that some schedular temporary total evaluations are to be assigned for an open-ended period, and others are for a specified, closed-end period. An example of an open-ended period is found under diagnostic code 7528, Malignant neoplasms of the genitourinary system. A 100 percent evaluation is assigned, and six months after the cessation of surgical, X-ray, antineoplastic chemotherapy or other therapeutic procedure, a mandatory VA exam is conducted. Subsequent evaluations will be based on the residual disability found on exam. Any change in the evaluation based on that exam or subsequent exams shall be subject to the due process requirements of 38 CFR §3.105(e).

In contrast, a schedular temporary total evaluation with a closed-end period is found under diagnostic code 5055, Knee replacement (prosthesis). The rating schedule directs that, following hospital discharge, a one month total rating be assigned based on 38 CFR §4.30. This is followed by assignment of a temporary total evaluation for a period of one year following implantation of the prosthetic joint. After the expiration of the one year, generally, the minimum schedular evaluation is assigned.

In the first example of prostate cancer, there is no question that the plain language of the rating schedule requires a future examination.

**Therefore, the future examination will be scheduled by the rating decision.** In the second example of a knee replacement, there is no such direction or guidance. In keeping with VA's current emphasis on simplifying the claims process and reducing the number of unnecessary examinations, new guidance is being issued.

Effective immediately, in cases where the rating schedule provides for a closed-end temporary total evaluation, the rating establishing the total evaluation will prospectively assign the minimum schedular evaluation effective the day following expiration of the prescribed total period. **No future examination will be scheduled prior to**

**the expiration of the temporary total period.**

The decision notice letter will inform the veteran of the duration of the temporary total period and the effective date of reduced schedular minimum evaluation.

The exception to this guidance is when the evaluation prior to the temporary total period exceeds the minimum schedular evaluation, and that evaluation is protected under 38 CFR 3.951(b). In such cases, no future examination will be scheduled, and the higher protected evaluation will be assigned the day following expiration of the temporary total period.

The M21-1MR will be revised to reflect this guidance.

**New Procedures for Claims Based on Herbicide Exposure in Thailand and Korea**

Effective immediately, when regional offices (ROs) receive disability claims based on exposure to tactical herbicides, such as Agent Orange, from Veterans who served in Thailand or Korea during the Vietnam era, there is no longer a requirement to send an inquiry to the C&P Service Agent Orange Mailbox. Development inquiries can be sent directly to the Army and Joint Services Records Research Center (JSRRC) when the available evidence does not indicate tactical herbicide exposure. This will reduce processing time and provide better service to Veterans.

**Herbicide related claims from Veterans with Thailand service**

After reviewing documents related to herbicide use in Vietnam and Thailand, C&P Service has determined that there was significant use of herbicides on the fenced in perimeters of military bases in Thailand intended to eliminate vegetation and ground cover for base security purposes. Evidence of this can be found in a declassified Vietnam era Department of Defense (DoD) document titled *Project CHECO Southeast Asia Report: Base Defense in Thailand*. Therefore, when herbicide related claims from Veterans with

Thailand service are received, RO personnel should now evaluate the treatment and personnel records to determine whether the Veteran's service activities involved duty on or near the perimeter of the military base where the Veteran was stationed.

DoD has provided information that commercial herbicides, rather than tactical herbicides, were used within the confines of Thailand bases to control weeds. These commercial herbicides have been, and continue to be, used on all military bases worldwide. They do not fall under the VA regulations governing exposure to tactical herbicides such as Agent Orange. However, there is some evidence that the herbicides used on the Thailand base perimeters may have been either tactical, procured from Vietnam, or a commercial variant of much greater strength and with characteristics of tactical herbicides. Therefore, C&P Service has determined that a special consideration of herbicide exposure on a facts found or direct basis should be extended to those Veterans whose duties placed them on or near the perimeters of Thailand military bases. This allows for presumptive service connection of the diseases associated with herbicide exposure. The majority of troops in Thailand during the Vietnam era were stationed at the Royal Thai Air Force Bases of U-Tapao, Ubon, Nakhon Phanom, Udorn, Takhli, Korat, and Don Muang. If a US Air Force Veteran served on one of these air bases as a security policeman, security patrol dog handler, member of a security police squadron, or otherwise served near the air base perimeter, as shown by MOS (military occupational specialty), performance evaluations, or other credible evidence, then herbicide exposure should be acknowledged on a facts found or direct basis. However, this applies only during the Vietnam era, from February 28, 1961 to May 7, 1975.

Along with air bases, there were some small Army installations established in Thailand during this period, which may also have used perimeter herbicides in the same manner as the air bases. Therefore, if a US Army Veteran claims a

disability based on herbicide exposure and the Veteran was a member of a military police (MP) unit or was assigned an MP MOS and *states that his duty placed him at or near the base perimeter*, then herbicide exposure on a facts found or direct basis should be acknowledged for this Veteran. The difference in approach for US Army Veterans is based on the fact that some MPs had criminal investigation duties rather than base security duties. Therefore, the Veteran's lay statement is required to establish security duty on the base perimeter. This also applies to US Army personnel who served on air bases in Thailand. During the early years of the war in Vietnam, before Air Force security units were fully established on air bases in Thailand, US Army personnel may have provided perimeter security. In such cases, if the Veteran provides a lay statement that he was involved with perimeter security duty *and there is additional credible evidence supporting this statement*, then herbicide exposure on a facts found or direct basis can be acknowledged for this Veteran.

Evaluation and adjudication of the cases described above can now be conducted by RO personnel without input from the C&P Service Agent Orange Mailbox. These instructions replace those provided in the August 2009 C&P service Bulletin. In summary, no herbicide related claim from a Thailand Veteran should be sent to the C&P Service Agent Orange Mailbox. If evidence shows that the Veteran performed duties along the military base perimeter, ROs should acknowledge herbicide exposure on a facts found or direct basis. If the available evidence does not show service along the base perimeter and does not otherwise indicate exposure to tactical herbicides, place the *memorandum for the record* from M21-1MR IV.ii.2.C.10.q in the claims file and send a request for information to JSRRC.

### **Herbicide related claims from Veterans with Korean service**

Currently, tactical herbicide exposure can be presumed for Veterans who served in specific US Army units that operated along the Korean

demilitarized zone (DMZ) from April 1968 through July 1969. These units were identified by DoD documents and are listed in M21-1MR IV.ii.2.C.10.o. When service treatment or personnel records show that a Veteran was assigned to one of these units during the time frame of tactical herbicide use, the Veteran qualifies for the presumption of exposure. When a Veteran with Korean service alleges herbicide exposure but was not in one of the specified units or was in one of the specified units outside the time frame of tactical herbicide use, ROs were previously instructed to send an inquiry to the Agent Orange Mailbox for any additional evidence that might indicate tactical herbicide exposure.

C&P Service has now determined that ROs are no longer required to submit herbicide exposure inquiries from Korean service Veterans to the Agent Orange Mailbox. Inquiries related to potential herbicide exposure outside the specific units and time frame listed in M21-1MR should now be sent directly to JSRRC.

These policy changes are intended to reduce the time required to process these claims.

## **Procedures (212)**

### **M21-1Manual Rewrite (MR) Updates**

Recently, C&P Service released changes to [M21-1MR](#) that:

- updates procedures regarding claims for service connection for death from suicide (M21-1MR, Part IV, Subpart iii, Chapter 2)
- includes new information on Vocational Rehabilitation and Education (VR&E) motivational contact procedures and controlling the 810-diary in Share (M21-1MR, Part IX, Subpart I, Chapter 1, Section A)

For a detailed list of all the changes made to these chapters, please refer to the Transmittal Sheet in the "Changes by Part" or "Changes by Date" link

at the top of the MR main website.

### Handling and Storage Requirements for the DoD STR Folder

When a servicemember leaves the military, his or her Service Treatment Records (STRs) are transferred to VA on a long-term loan. The Department of Defense (DoD) is the owner of the STRs and the STR folder.

The DoD Records Custodians have raised the issue that VA is destroying their STR folders, which contain some medical documentation on the servicemember/Veteran, thus destroying the integrity of the total STR.

The M21-1 Manual Rewrite(MR), specifically Part III, Subpart iii, Chapter 2, Section A, details handling and storage requirements for STRs. The M21-1MR does not authorize the destruction of the STR folder. **Under no circumstances should the STR folder be destroyed.**

Some specifics related to handling and storing DoD STRs on loan to VA include:

- Avoid marking on, date stamping, or punching holes in any records received from the service department. Avoid removing STRs from the STR folder unless necessary for photocopying (M21-1MR III.iii.2.A.2.a).
- STRs belong to the respective service departments and are on loan to VA. As such, the STRs are subject to recall by a service department (M21-1MR III.iii.2.A.2.c).
- While in VA's possession (M21-1MR III.iii.2.A.2.c):
  - Place the STR folder neatly within the claims folder
  - Do not remove or rearrange documents from the STR folder unless necessary for photocopying
  - Do not place the STR folder in a VA

Form 21-4582, Service Department Records Envelope

- Establish a separate volume of the claims folder in which to maintain the STR folder or STR envelope if the thickness is more than one inch, or more than two and one-half inches when combined with the claims folder
- Additionally, when a service department requests return of the STR folder, VA must:
  - Photocopy the STRs
  - Stamp the copies to show they are copies of the originals and that the original STRs were returned.
  - Place photocopies of STRs in *VA Form 21-4582*.
  - File *VA Form 21-4582*, with STR copies in the center flap of the claims folder.
  - Return the original STR folder and the original STRs to the service department.

### Fast Letter (FL) 10-16, Fully Developed Claim Program

The Veterans' Benefits Improvement Act of 2008, Public Law 110-389, § 221(a) mandated VA carry out the pilot program Expediting Fully Developed Claims (FDCs) to assess the feasibility and advisability of expeditiously processing FDCs within 90 days of receipt. On December 17, 2008, C&P Service released Fast Letter (FL) 08-48, *Pilot Program on Expediting Fully Developed Claims* instructing ten ROs to implement the FDC pilot program. VA has now decided to expand the program for implementation at all ROs.

On May 3, 2010, C&P Service released FL 10-16, *Fully Developed Claim Program*. The FL rescinds FL 08-48, modifies previous guidance released for the FDC pilot program, and provides guidance for nationwide RO implementation of the FDC Program.

The FL comes with three enclosures: draft



versions of the VA Form 21-526EZ, *Fully Developed Claim/Express Compensation Claim*, and the VA Form 21-527EZ, *Fully Developed Claim/Express Pension Claim*, and a copy of the FDC folder flash. The draft forms provided with the FL are **not** to be disseminated or used. Central Office is awaiting the Office of Management and Budget (OMB) approval of these forms and will promptly notify the field upon such approval.

Please remind staff **not** to use the Share flash, *Fully Developed Claim*, since the flash was for use with the FDC pilot program **only**. Additionally, do **not** use the following special issues: *Express Claim*, *Express Claim Excluded-Additional Evidence*, *Express Claim Excluded-Failed to Report for Exam*, and *Express Claim Excluded-VBA Administrative Reason*. Please reference FL 10-16 for more information on identifying claims associated with the FDC Program.

## Training & Contract Exams (213)

### Skills Certification

The next Rating Veteran Service Representative (RVSR) Certification test is scheduled for June 9, 2010. To be eligible to take the test, RVSRs must have completed the RVSR training curriculum, meet the local trainee performance standards, and have been in the position for a minimum of six months and not more than 24 months.

The initial Operational Certification test for Decision Review Officers (DROs) is scheduled for June 16, 2010. To be eligible to take the test, DROs must be at a GS-13 grade level or above, assigned as a DRO for at least six months and meet the local DRO performance standards.

The next Pension Management Center (PMC) Veteran Service Representative (VSR) Certification test is scheduled for June 23, 2010. VSRs may sit for certification 90 days prior to the earliest date they achieve one year specialized

experience at the GS-10 level. A VSR must also meet the local performance standards at the time of the test.

Further information regarding these tests will be forthcoming from the Office of Field Operations (OFO).

### Training Performance Support System (TPSS) Module 6 - Burials

A team consisting of C&P personnel and three field subject matter experts (SMEs) have been assigned to review and update the VSR TPSS Module 6 – Burials. George Boyd, C&P; Elizabeth Garcia, Denver RO; Wendi Hoyt, Nashville RO, and Jamie Goedtke, St. Pete RO, completed their initial review and are making necessary changes. Areas needing the most change relate to dates of claim, date of death and date of burial. Along with revising the information about dates, updated Modern Award Processing-Development (MAP-D) and Personal Computer Generated Letter (PCGL) notifications and current rates and eligibility requirements for Burial Allowance and Plot/Interment benefits will be included. This module is scheduled to be released to the field by October 31, 2010.

### Electronic Performance Support System (EPSS) – Combat Related Disability Payments (CRDP)/Combat Related Special Compensation (CRSC)

A team made up of C&P personnel and two field SMEs have been preparing a new Electronic Performance Support System (EPSS) tool to assist in processing Combat Related Disability Payments (CRDP)/Combat Related Special Compensation (CRSC) claims and Audit Error Worksheets (AEW). George Boyd, C&P; Raymond Lund, Waco RO and Tom Kenville, Cleveland RO, have worked with the contractor from General Dynamics to establish this tool. We have completed the initial phase and are preparing the tool for field testing at a designated RO. Experienced and novice VSRs will be selected to

process a variety of individual claims based on CRDP/CRSC and their AEWs. The analysis from the field test will assist the team in identifying any confusion or misunderstandings when using the tool. This tool is scheduled to be released to the field by August 31, 2010.

## **Quality Assurance (214)**

### **End Product (EP) Transaction Reports**

The *Rating EP Transaction Review* reports posted on the C&P Program Operations Intranet webpage are no longer active; however, reports through May 1, 2009 will remain available on the website for historical purposes. C&P Service has discontinued the reports because most of the data is now available through VETSNET Operations Reports (VOR).

We encourage ROs to monitor their data integrity by reviewing the *VOR-Completed Claims Detail* report to validate rating end products (EPs) completed within five days of the date of claim. We also encourage stations to review the *VOR-Detailed-Cancelled EPs* report to validate the cancellation of rating EPs that were pending greater than 180 days. These two reports mirror the data that was available through the C&P *Single EP Transaction* reports.

The *VOR-Completed Claims Detail* report provides data regarding multiple rating claims improperly cleared with the same date of claim. This mirrors some of the data that was available through the *Multiple EP Transaction* reports. We also encourage RO managers to routinely review the *VOR-Pending-Multiple Rating EP* report to validate station compliance with the procedures of FL 09-39, *Sequential End Products (EPs) and Third-Digit Modifiers*, dated October 2, 2009.

The Program Operations site visit staff will be monitoring these VOR reports for data integrity as part of the site visit protocol.

Please direct any questions to the Program

Operations staff at [VAVBAWAS/CO/214A](http://VAVBAWAS/CO/214A).

### **Site Visit Common Findings Report**

The FY 2009 Site Visit Common Findings report has been posted to the C&P Site Visit Intranet webpage. The report can be accessed through the following link:

<http://10.220.1.4/bl/21/sitevisit/sitevisit.asp>

The majority of action items fall into the Workload Management category. The most significant repeated findings in this area were improper execution of the Workload Management Plan and lack of standard operating procedures in place for proper mail analysis, mail control and processing.

Questions regarding this report may be directed to the Program Operations Staff mailbox at [VAVBAWAS/CO/214A](http://VAVBAWAS/CO/214A).

### **EP 600 Date of Claim (DOC) Issue**

In reviewing EP 600s, some inconsistencies with the date of claim (DOC) have been identified. EP 600s should be established timely and monitored closely to minimize overpayments. Per [M21-1MR.I.2.B.7.b](#) and [TL 09-04](#), an EP 600 should be established at the time the notice of adverse action is sent. Questions concerning this should be forwarded to [VAVBAWAS/CO/214B](http://VAVBAWAS/CO/214B).

### **Folder Maintenance and Repair**

The Quality Assurance Staff has been providing comments on non-segregated folders requiring renovation prior to shipping to Nashville for STAR review. Many folders are shipped to Nashville that have loose mail and service treatment records that should be filed down prior to shipping, need replacement, and need additional volumes created. This is a reminder that per [M21-1MR.4.G.](#), Veterans folders should be maintained to provide maximum protection of their contents by replacing folders and envelopes that become damaged. Any required renovation should be preformed prior to transferring the

folder out of the office. Questions concerning this should be forwarded to [VAVBAWAS/CO/214B](mailto:VAVBAWAS/CO/214B).

## **Business Management (215)**

### **C&P Calendar Update**

The C&P Calendar web page is a one-stop source for new and updated information both relating to the C&P Intranet and to C&P Service at large. In an effort to improve the sharing of information, C&P Service has developed a subscription service for the calendar. Users who subscribe to the calendar will receive automatic e-mail updates whenever a calendar item is added or changed. Each e-mail update will contain the body of the new or changed calendar item as well as a link to the calendar itself. To subscribe, please visit

[http://vbacodmoint1.vba.va.gov/bl/21/calendar/cal\\_Subscribe.asp](http://vbacodmoint1.vba.va.gov/bl/21/calendar/cal_Subscribe.asp). Please contact the [VAVBAWAS/CO/21WEB](mailto:VAVBAWAS/CO/21WEB) e-mail box with any questions, comments, or suggestions about this service or anything on the C&P Intranet.

### **Homeless Flash**

The proper use of the Homeless Flash in Share requires that the Homeless Veteran indicator on the BIRLS Miscellaneous Info (MSC) screen be checked. Checking the Homeless Veteran indicator in BIRLS will also automatically add the Homeless flash in Share when processed as a BIRLS Update. This action is only required once for each of these claims.

If a Homeless Flash is established in Share, but not in BIRLS, the next time a BIRLS update is processed, the Homeless Flash in Share will be removed.

If the flash needs to be removed, simply un-check the Homeless Veteran indicator and perform a BIRLS update.

Please note, this information was previously distributed in an e-mail from OFO on May 3,

2010. Questions can be directed to C&P Service at [215A.VBACO@va.gov](mailto:215A.VBACO@va.gov).

### **Compensation and Pension Record Interchange (CAPRI) Upgrade**

VBA will be nationally deploying a new version of the Compensation and Pension Record Interchange (CAPRI) application. This version will fix several defects and add enhancements to the application. Additional information can be found in the release notes which can be downloaded from the [VHA Software Document Library](#). The following outlines major improvements that will affect VBA's use of CAPRI:

- A previous release of CAPRI prevented users from copying and pasting on the C&P Exam Request screen via shortcut keys or the mouse right-click menu. This issue has been resolved.
- CAPRI will now allow the addition of a new patient record with a first name consisting of only a single character. This issue was first reported by the Togus RO when they tried to create a new record in CAPRI for a patient whose first name consisted of only the character "J."
- CAPRI will now support the need to enter foreign addresses for a patient's permanent, temporary, and confidential addresses.
- In support of the Disability Evaluation System (DES) program, CAPRI has been modified to allow the selection of "TRICARE" or "SHARE AGREEMENT" as Primary Eligibility options when creating a new patient record.

As with any software release, this release does create some issues that will be addressed in a future release. The following outlines major known issues with this release:

- Duplex (double-sided) printing is ignored by CAPRI, even if the default printer settings call for duplex printing.
- The Site Selection screen does not honor a

space as a character when typing in a facility name. Using the mouse or arrow keys to make a site selection is unaffected.

## Veterans Services (216)

### Fast Letter 10-12, Revised Fiduciary Program Policies and Procedures

On April 20, 2010, C&P Service released FL 10-12, *Revised Fiduciary Program Policies and Procedures*. This FL significantly revises several Fiduciary Program requirements including:

- New Requirement for Documentation of Expenditures - The long-standing provision of M21-1MR, Part XI, 3.D.17d mandating that Legal Instruments Examiners (LIE) obtain receipts for any questionable expense remains in effect. However, effective April 21, 2010, a receipt is required for any unbudgeted item in excess of \$1,000. Furthermore, a receipt is now required for any budgeted item which exceeds the *Fund Usage Agreement* by more than 15 percent, if the financial institution documents do not verify the expense.
- New Misuse Requirements - Recent reviews of misuse determination findings during C&P Service site visits to ROs have revealed the need for additional examinations of misuse procedures. Effective April 21, 2010, once the RO completes its final action on a misuse case, the misuse allegation, memorandum not to investigate, or the investigation and determination with all supporting documents, must be submitted to the C&P Service Fiduciary Staff. Copies of these documents should be submitted to:

VA Central Office  
810 Vermont Ave. NW  
Attn: C&P Service (216A)  
Washington, DC 20420

The necessary paperwork may be electronically submitted to the Fiduciary Mailbox at [VAVBAWAS/CO/F&FE](mailto:VAVBAWAS/CO/F&FE), but *only* if the signatures are included in the electronic

record and the supporting documentation has been scanned for inclusion. M21-1MR will be updated to reflect this change.

- New Requirement for Collection of Fiduciary ID - *FBS Users Guide*, Chapter 8, Section 3a defines the fiduciary identification as a Social Security number for an individual or a taxpayer ID number for an entity other than an individual. The guide states that this number is required if the fiduciary is an individual, but it does not indicate whether the number must be collected for an entity other than an individual. Effective April 21, 2010, a Social Security or Taxpayer ID number is required of all fiduciaries, and must be recorded in FBS. On all initial appointment field examinations, ROs and the Western Area Fiduciary Hub (Hub) must collect the fiduciary ID. Every fiduciary-beneficiary (F-B) field examination must either collect the fiduciary ID or confirm the fiduciary ID is a matter of record. *The FBS Users Guide* will be updated to reflect this change.
- New Onsite Review Requirements - M21-1MR, Part XI, Chapter 6.a.1.e requires that a copy of Onsite Review Reports be filed in the Onsite Review File for the fiduciary and maintained for the life of the file. The life of the file expires when the fiduciary is released from all cases. Recent findings during C&P Service site visits have revealed inconsistencies in conducting onsite reviews. Effective April 21, 2010, all completed onsite reviews will be reviewed by the C&P Service Fiduciary Staff. ROs and the Hub must submit a copy of the signed Onsite Review Report and supporting documentation within ten days of completion of the Onsite Review Report to:

VA Central Office  
810 Vermont Ave. NW  
Attn: C&P Service (216A)  
Washington, DC 20420

Onsite Review Reports may be electronically submitted to the Fiduciary Mailbox at [VAVBAWAS/CO/F&FE](mailto:VAVBAWAS/CO/F&FE), but *only* if the